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IN THE

Supreme Court of the United States

October Term, 1967
No. 880

WILLIAM BRAY,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Brief for Respondent in Opposition to Petition for Writ of Certiorari.

Statement of Facts.

Lt. Burt Eckstrom of the Huntington Beach Police Department testified that the petitioner, Mr. William Bray, as sole owner, had operated the Top Hat Liquor Store for two or three years in Huntington Beach, California [R. I, 15, 16] and that he sold candy, chewing gum, liquor and grocery items as well as books [R. I, 5]. Immediately as a person entered the store, he could see a rack of books and magazines directly in front of him and just inside the door [R. I, 5]. Lt. Eckstrom examined certain photographs and stated that they fairly represented the appearance of the store [R. I, 23, 34].

On January 7, 1966, Lt. Eckstrom purchased four books, one of which was *Surf Broad* by Ray Train (Satan Press), charged in Count II of the Complaint

[R. I, 8]. In a conversation with the petitioner, Lt. Eckstrom stated he had read some of the Satan Press Books being sold in the store and that in one of the books an act of sodomy between a pony and a woman was described which he felt was obscene. Petitioner replied that the Kinsey Report indicated that five per cent of American women receive sexual satisfaction from relationships with animals. Mr. Bray went on to say that ninety-nine per cent of the people who entered his store wanted this particular type of book and that Lt. Eckstrom must be one of that one per cent who objected [R. I, 10].

Subsequently, Lt. Eckstrom purchased 5 books entitled *Everybody Wins, Sweet Sixteen, Nightmare in Leather, Sex Challenge,* and *Lust Can't Hide.* These books [Peo's Exs. 10-14] were introduced to show petitioner's knowledge of the nature of the material sold in his store and to show the setting in which the books were sold, *i.e.,* a type of advertising meant to appeal to the erotic interest of the customers [R. I, 16, 20].

On April 13, 1966, *Madame Butch* was purchased in petitioner's store by Lt. Eckstrom [Peo's Ex. 2, R. I, 21, 22, 33].

In October of 1965, a secretary for the Huntington Beach Police Department bought *Just for Kicks* for $.95 in petitioner's store [Peo's Ex. 6, R. I, 26, 27, 33].

Petitioner was arrested on a warrant by Lt. Eckstrom on April 23, 1966.

William K. Tynes, District Attorney's Investigator, testified that on April 23, 1966, at the time of petitioner's arrest, he searched The Top Hat Liquor Store and obtained certain nudist magazines and paperback

books as samples of the type of operation being conducted inside the store. Only samples were taken, not the complete supply of books [R. I, 56, 81, 98]. The books in Counts IV and V of the Complaint were seized at this time by Mr. Tynes [Peo's Exs. 4 and 5, R. I, 98]. The other books not specifically charged were admitted to show the defendant's knowledge of the contents of books sold in his store and also to show that he was purveying textual material openly advertised to appeal to the erotic interest of his customers; the magazines were not admitted to show his knowledge, but were admitted for the "purveying" issue [R. II, 32, III, 4].

A route salesman for the company which distributed the books in question, Jack Nelson, testified he had delivered books to The Top Hat Liquor Store during the period in question and that during one of his visits to the store he engaged in a conversation with the petitioner about the book *Surf Broad.* The petitioner stated *Surf Broad* was a very rough book and asked if there was a chance of being arrested because of it or because of the other Satan Press books which Mr. Nelson described as "generally a rough line of books" [R. II, 7, 10]. The petitioner told Mr. Nelson he had read *Surf Broad* and used the words "a damn rough book" in describing the contents [R. II, 7]. Mr. Nelson testified that petitioner regularly kept a book behind the counter, near the cash register, to read in lulls between customers [R. II, 11].

All five of the books charged in the Complaint were read to the jury from beginning to end [R. II, 102]. (The reading of the books was not made a part of the transcript). The People rested [R. III, 3], and there-

after the court refused to grant a defense motion for an advised verdict [R. III, 35].

Dr. Carolyn Sturak, Ph.D. in American Literature [R. IV, 4], testified that none of the books charged in the Complaint were obscene [R. IV, 9, 16, 19 and 24, 26, 45]. Elaborating, she testified that since Henry Miller described lesbian adventures in *Tropic of Cancer,* the lesbian adventures in the books herein charged could not be beyond the customary limits of candor [R. IV, 11]. Further, she testified the books all had social importance [R. IV, 15, 17, 23, 26]. In speaking of *Just For Kicks,* the best that could be said was: ". . . if you are going to enjoy sex, it's much nicer if you have no responsibility for it . . ." [R. IV, 23]. At one point she stated the book *Leather Girls* would have social importance to a sociologist or an anthropologist studying the American way of life twenty years from now [R. IV, 15], and that *Surf Broad* was "theological" in nature [R. IV, 23]. In referring to the appearance and the outside covers of the various books and magazines in evidence and also the five books charged, she stated that a person could form an opinion about the general subject matter of the material, *i.e.,* "an opinion of what it is purported to be like . . ." [R. IV, 33].

The petitioner, Mr. Bray, testified he had been selling these books in his store for about two and one half years [R. V, 20]. He further stated he recognized some of the items in evidence by remembering custom-

ers bringing them to the counter for purchase [R. V, 48].

Mr. Bray further testified that since the books and magazines are visible from the outside of his store to a person who is standing near the door [R. V, 45], since there is a hamburger shop nearby, and since children regularly come into his store for candy and pop, he felt the "Adults Only" sign should be placed above the magazines and books [R. V, 51, 49].

Referring to the book *Surf Broad,* published by Satan Press, Mr. Bray stated that when the court action came about, he started thinking about *Surf Broad,* and recalled that he had heard of it some place before. He elaborated by stating Jack Nelson at one time had said *Surf Broad* was a good seller [R. V, 26, 27]. At various times he recalled conversation arising regarding the possibility that he might become involved with the law for selling these books [R. V, 28]. He knew all his books had to do with sex and nudity [R. V, 54], and that Lt. Eckstrom had told him about the "human-animal" sex act, but that he continued to sell books of that same general nature [R. V, 51, 52]. He did not sell any well-known books or magazines such as *Life, Look* or *Field and Stream* [R. V, 54].

Petitioner denied reading any of the books, but stated that he might open the cover of one or two or even more of the magazines and look at the pictures [R. V, 47].

On rebuttal, Mr. David H. Malone, Chairman of the English Department and Chairman of the Comparative

Literature Program at the University of Southern California, was called by the Respondent [R. VI, 6], and testified his qualifications included study and teaching assignments at the University of North Carolina, Louisiana State University, Auburn University, University of Vienna, Phillip's University in Germany and the Sorbonne in Paris. He had been a Fulbright scholar at one time in his career and had also been the recipient of Ford Foundation funds for the purpose of study and teaching in Europe. At the time of his testimony, Dr. Malone supervised 34 professors and 25 teaching assistants at the University of Southern California. He had presented papers to various professional organizations, as well as having authored articles in several professional publications [R. VI, 6, 11].

Based on his education and experience and his knowledge of the type of books sold in the United States [R. VI, 23], Dr. Malone testified the book *Just for Kicks,* as well as the other four books, went substantially beyond the customary limits of candor [R. VI, 24, 30, 31].

After considering the witness's qualifications, the trial judge stated that he could testify about the prurient appeal of the books as well as the lack of social importance [R. VI, 16]. Thereafter he testified the book *Just For Kicks*, and the other four books charged were utterly without redeeming social importance and that the exclusive appeal is to prurient interest [R. VI, 17, 23, 24, 32].

Elaborating on the social importance concept, Dr. Malone said, "*Any* book has social importance because it is a manifestation of our society at a certain date and [it] would be used to study such phenomenon, but I would say it (*Just For Kicks*), is without redeeming social importance as literature" [R. VI, 24], (emphasis added). He further stated the books could have historical importance only to the extent that they would suggest what pornography does in any era, *i.e.,* exhibit an appeal to prurient interest [R. VI, 27]. The book *Just For Kicks* was definitely not written in the style of a scientific study [R. VI, 30]; and the artistic value, if any, existed only for the purpose of providing a series of prurient episodes [R. VI, 25]. *Just For Kicks* advocates no idea other than sex for the purpose of prurient appeal [R. VI, 27].

In describing the type of writing contained in these books, Dr. Malone testified that generally the books contained a sketch of a plot which was merely a pretense for a series of erotic depictions; he could detect no significant sign of character development and stated it was more like caricaturization [R. VI, 29].

ARGUMENT.

I.

Certiorari Should Be Denied Because the Material in Question Constitutes Hard Core Pornography.

Because of its extreme character and because its sole appeal is to prurient interest, the book *Just For Kicks,* by Donna Powell should be denied constitutional protection. The sheer number of sexual acts described in this relatively short book is only one indication of the predominant appeal to the average reader. A box score of the sexual activity in the book indicates descriptions of the following activities:

23 acts of conventional intercourse, nine of which were in detail, the rest of which were described in part;

3 acts of anal intercourse;

12 lesbian acts, of which many were acts of oral copulation;

4 male homosexual acts, including oral copulation and masochism;

10 acts of masturbation by males and females, some with artificial phallic instruments;

5 acts of oral copulation between male and female;

1 orgy involving 4 to 6 persons, each with his body interlocked with one or more of the others, and all simultaneously engaging in oral copulation and various other acts of perversion;

1 sexual act between a female and a shetland pony.

The book describes approximately 60 sexual acts in 158 pages, not counting the many descriptions of "breast

fondling" (frequently between women). In light of this massive amount of sexual activity, it is difficult for one to conceive of any appeal other than a prurient appeal.

It is respectfully submitted to this Court that almost all people in the community would feel shock and surprise in reaction to the manner or means of description in the book, *Just For Kicks*. The fact that the manner or means of description is similar to the description of sexual activity in *Tropic of Cancer* and other books remains unimportant. Such books have not been accepted as an example of the customary limits of candor, as petitioner assumes. *Tropic of Cancer* may go substantially beyond the customary limits of candor in certain parts and still not be obscene for the reason that the book, taken as a whole, may have some other appeal or some social importance. Petitioner's logic that a book must be more extreme than *Tropic of Cancer* in order to be obscene simply is not and should not be a part of the obscenity standard. The trial court, the jury, and the expert witness all clearly held that *Just For Kicks* goes substantially beyond the customary limits of candor.

Justice Stewart, in a note to *Ginzburg v. United States*, 383 U.S. 463, 498, described hard core pornography as that type of writing verbally describing and "graphically depicting acts of sexual intercourse, including various acts of sodomy and sadism and sometimes involving several participants in scenes of orgy-like character . . .". *Just For Kicks* falls within that description.

According to the expert witness, the book makes no effort at characterization; it indicates no study of

human nature, and no attempt is made to portray reality. No ideas are presented, no real story is told and no attempt is made to advance human knowledge or understanding in science, literature or art. Clearly, the book lacks literary merit and social importance.

Just For Kicks appears to be more extreme than the fifty books held obscene in *Mishkin v. New York,* 383 U.S. 502, 505. In describing those books, it was stated: "50 books are involved in this case. They portray sexuality in many guises. Some depict relatively normal heterosexual relations but more depict such deviations as sado-masochism, fetishism and homosexuality." Judged by its appeal to deviant groups or to the average person and when compared to the material in *Mishkin,* the evidence in this case supports a judicial finding that the book, independent of any pandering aspects, constitutes hard core pornography and is not protected by the First Amendment.

II.

Certiorari Should Be Denied Because Evidence of Pandering Requires a Finding That the Materials in Question Are Obscene.

As noted in Part I of the argument, it is contended that the materials in question are hard-core pornography on their face in light of the evidence presented at the trial. Assuming, without conceding, that if this Court were to conclude that the materials were not hard-core pornography, there is sufficient evidence of pandering to justify a finding that the materials in question are obscene. Such evidence of pandering may, in a close case, "be probative with respect to the nature of the material in question and thus satisfy the

Roth test." *Ginzburg v. United States,* 383 U.S. 463, 474.

As stated in *Ginzburg,* 383 U.S. at 475-476:

> Where an exploitation of interests in titillation by pornography is shown with respect to material lending itself to such exploitations through pervasive treatment or description of sexual matters, such evidence may support the determination that the material is obscene even though in other contexts the material would escape such condemnation.

The book *Just For Kicks* was sold as a small part of a total operation designed for the "commercial exploitation of erotica, solely for the sake of its prurient appeal." In fact the petitioner indicated that this was exactly the reason that he offered this type of material for sale. He said to a police officer that ninety-nine percent of the people who entered his store wanted this particular type of book, implying that this is exactly the reason that books concerned only with sex and nudity were sold.

Considering as a group the names of the books appearing on the bookstand and which were thrust in the face of any child or adult walking into the store, together with the photographs of the store's interior, the "leer of the sensualist" clearly is shown in only a different form than that described in *Ginzburg v. United States,* 383 U.S. 463, 467. Some of the books were entitled as follows: *Three and One-Half Women, Queer Trap, Lust in Leather, Native Nymph, Lucious Lesbian, Hot Angel, Share My Wife, Satan Was a Lesbian,* and *Queer For a Day.* Such names, the pictures on the fronts, the excerpts on the backs of the

books and on the first inside pages are all examples of the "deliberate representations of petitioner's publication as erotically arousing" and of the type which stimulate the reader to accept them as prurient.[1]

III.

Certiorari Should Be Denied Where the State's Evidentiary Procedures Meet Constitutional Standards and Where No Substantial Federal Question Is Presented.

The evidence presented in the municipal court trial adequately supports the finding of obscenity. An expert witness called by the People was declared qualified by the judge and testified about all elements of the obscenity definitions. Moreover, the book itself was considered as evidence.

The State of California has power "to regulate procedures under which its laws are carried out, including the burden of producing evidence unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Speiser v. Randall,* 357 U.S. 513, 523. In First Amendment issues the state must only "provide procedures amply adequate to *safeguard* against invasion speech which the constitution protects." *Speiser v. Randall,* 357 U.S. at 524. California, in the case at bar, and by case law has provided sufficient safe-

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[1]It should be noted that the California Supreme Court recently indicated that the concept of pandering is not part of the California statutory scheme. See *People v. Noroff,* 67 Adv. Cal. 814, 816. Such a conclusion does not prevent this Court from deciding that under federal constitutional standards as established by this Court in *Ginzburg,* the matter is obscene even though such standards are not the basis upon which the state courts would draw this conclusion. See *Cooper v. California,* 386 U.S. 58, 61.

guards by providing that expert testimony may be introduced by the accused if he so desires. *People v. Williamson,* 207 Cal. App. 2d 839, 847, citing *Smith v. California,* 361 U.S. 147, 172. Requiring that such testimony be brought forth by the prosecution would not further safeguard a person's constitutional rights.

Petitioner's argument regarding the alleged need for expert witnesses does not present a constitutional issue under the First Amendment. Rather, petitioner raises due process issues by contending there is no evidence whatsoever to support the judgment. Clearly, the book itself is *some* evidence and thus the California procedure cannot be viewed as being one where the record is "entirely lacking in evidence" as was the case in *Thompson v. City of Louisville,* 362 U.S. 199, 204. Thus, in no respect has California offended a fundamental principle of justice such as to require a granting of certiorari.

Because the view of the average person is important in an obscenity case, experts are not needed to testify regarding the average person's feelings, any more so than an expert is needed to testify about the "reasonable man standard" in a negligence action. The jury itself, represents a cross-section of the community and can make a judgment in most situations. *Kingsley Books v. Brown,* 354 U.S. 436, 448, Justice Brennan dissenting; *Smith v. California,* 361 U.S. 147, 165, Justice Frankfurter concurring. *Just For Kicks* is easily understood by almost any adult or child and for that reason a jury can easily determine obscenity from the book itself. *Kahm v. United States,* 300 F. 2d 78, 84; *People v. Pinkus,* 256 Adv. Cal. App. Supp. 175, 180.

In many other situations the fact-finder must pass upon questions of prurient appeal and lewdness without

expert testimony of any kind. For instance, Section 647(a)1 of the California Penal Code requires a determination of the type of activity which annoys or molests a child (i.e., what is the appeal of the particular activity); Section 288 of the California Penal Code requires that the jury determine whether an act is lewdly committed and whether it is done with the intent of "arousing, *appealing to* or gratifying . . . lust or passion or sexual desires . . . (emphasis added)." See also, Sections 314.2 and 647(a) of the California Penal Code.

From the record presented to this court, no substantial federal question appears; certiorari should be denied.

IV.

Certiorari Should Be Denied Because the Evidence of Petitioner's Knowledge of the Book's Obscenity Supported the Jury's Verdict.

Section 311(e) of the California Penal Code requires that the defendant have knowledge that the material being sold is obscene. Clearly no person could be held to a standard of recognizing, in advance, that which will be held obscene as that term would be used by a court in a judicial proceeding. See *Ginzburg v. United States,* 383 U.S. 463, Justice Black dissenting. Rather, the trier of fact must find that the defendant knew the contents of the material and was "in some manner aware of its obscene character." *People v. Campise,* 242 Cal. App. 2d Supp. 905 (1966), disapproved on a different issue by *Flack v. Municipal Court,* 66 Adv.

Cal. 1035, 1047, footnote 2; *People v. Pinkus,* 256 Adv. Cal. App. Supp. 175, 184.

There has been no cause where this Court has required, on constitutional grounds, a state to sanction a particular mode of proof. *Smith v. California,* 361 U.S. 147, 172, Justice Harlan concurring and dissenting. "Eyewitness testimony of a bookseller's perusal of a book hardly need be a necessary element in proving his awareness of its contents. The circumstances may warrant the inference that he was aware of what a book contained, despite his denial." *Smith v. California,* 361 U.S. at 154.

The evidence presented at trial showed that the petitioner knew all the books he sold dealt with sex and nudity [R. V, 54]; that he had asked the publisher's route salesman if there was any chance of becoming involved with the law over the Satan Press Books (one of which is *Just For Kicks,* by Donna Powell) [R. II, 10, 7]; and that he knew one of the books described sexual relations between a pony and a woman [R. I, 10]. It further appeared that the petitioner kept some of the books behind the counter to read between waiting on customers [R. II, 11]; that the books were positioned so as to be visible to every passer-by and that according to a sign, "Adults Only" were to read these materials [Peo's Exs. 3B-C-D-I-H-G].

The petitioner testified that he had at no time read any of the books he sold [R. V, 47], that he had at no time kept books behind the counter [R. V, 38] and that

he had never read *Surf Broad* [R. V, 35]. The jury could not have reconciled such testimony with that of the publisher's route salesman who indicated he had seen the defendant keep books behind the counter [R. II, 11] and heard him call *Surf Broad* a "damned rough book." [R. II, 7]. Thus, the jury could have inferred that the petitioner was willfully false as to a material fact; such circumstance not only furnishes a ground for disbelieving other testimony of this defendant, "but also tends to show consciousness of guilt or liability on his part and has probative force in connection with other evidence on the issue of such guilt or liability. Such false testimony is in the nature of an admission from which, with other evidence, guilt or liability may be inferred". *People v. Wayne,* 41 Cal. 2d 814, 823; *People v. Osslo,* 50 Cal. 2d 75, 93.

The California courts have held that guilty knowledge may be inferred from circumstantial evidence. *People v. Wepplo,* 78 Cal. App. 2d Supp. 959, 966; *People v. Williamson,* 207 Cal. App. 2d 839, 846. It is the People's contention that there was ample evidence to support the " 'sufficient evidence' standard of review —requiring something more than merely any evidence but something less than substantial evidence on the record as a whole." *Jacobellis v. State of Ohio,* 378 U.S. 184, 203, Chief Justice Warren dissenting. Petitioner's argument regarding the sufficiency of evidence must be relegated to a violation of the Fourteenth Amendment, based on the contention that there is no evidence whatsoever supporting the judgment. *Thompson v. City of Louisville,* 362 U.S. 199.

V.

Certiorari Should Be Denied Because Evidence of Knowledge and Setting, Consisting of Samples of Books and Magazines Found in Petitioner's Store, Was Lawfully Seized Incidental to a Valid Arrest.

The samples of books found in the store by Investigator Tynes were seized for the probative value they would have to the jury and the court on the pandering issue and on the issue of knowledge. Clearly, the books were not seized because they were obscene or because they were contraband. The taking may fairly be classified as a seizure of instruments of the crime or as "mere evidence," either of which would be proper when incidental to a valid arrest. *Warden, Maryland Penitentiary v. Hayden,* 387 U.S. 294; *United States v. Rabinowitz,* 339 U.S. 56; *People v. Thayer,* 63 Cal. 2d 635; *People v. Pinkus,* 256 Adv. Cal. App. Supp. 175.

Since only one to three copies of each of the many books in stock were taken, only a most strained sort of reasoning could lead one to find a system of "prior restraint," such as that which existed in *A Quantity of Books v. Kansas,* 378 U.S. 205, wherein all 1,715 copies were seized.

In a fact situation where seized books are not charged as obscene, the seizure should be viewed as being similar to the seizure of a non-contraband item which in and of itself provides evidence regarding some other issue, such as a note expressing a threat to kill in a murder case.

Conclusion.

This Court recently has reversed a number of decisions on the basis of *Redrup v. New York,* 386 U.S. 767. If this Court believes that there is any merit in the instant petition for writ of certiorari (and we contend there is none whatsoever), then this case should not be disposed of in as summary a fashion since, as distinguished from Redrup and its proneny, there was certain evidence of pandering. Furthermore, the material itself is more extreme than that passed upon by this Court in *Mishkin v. New York,* 383 U.S. 502; if there is to be any difference in result, the states should be offered some guidelines so that they can properly apply the constitutional distinctions found by this Court.

For the reasons set forth above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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